[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 25, 2008]

Nos. 05-5487, 05-5489

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, ET AL.,
Appellees,
v.
GEORGE W. BUSH, ET AL.,
Appellants.

EDHAM MAMET, ET AL.,
Appellees,
v.
GEORGE W. BUSH, ET AL.,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL RESPONSE BRIEF FOR APPELLANTS

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GLOSSARY

App. ..... Appendix

CAT ..... Convention Against Torture

DTA ..... Detainee Treatment Act

FARRA ..... Foreign Affairs Reform & Restructuring Act

MCA ..... Military Commissions Act

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SUMMARY OF ARGUMENT

I. Remarkably, petitioners ask this Court to adopt the very rationale rejected by the Supreme Court in *Munaf* v. *Geren*, 128 S.Ct. 2207 (2008). Petitioners argue that the injunctions are justified to preserve the district court's habeas jurisdiction. In *Munaf*, the Court reversed a district court order that was based on that same

theory. The Court explained that the Constitution does not afford the detainees the right to challenge a transfer to the custody of another country, even when the detainees allege, notwithstanding sworn statements of the responsible U.S. officials to the contrary, that the transfer will be "likely to result in torture." *Id.* at 2222, 2225.

Petitioners cannot escape the import of *Munaf* by citing to the All Writs Act, which was similarly invoked in *Munaf.* Moreover, *Munaf,* like this case, involved claims of possible torture upon transfer. The Court explained that the detainees' allegations of possible torture were for consideration by "the political branches, not the judiciary." *Id.* at 2225.

II. Sections 2241(e)(1) and (e)(2) bar jurisdiction to enter orders pertaining to transfer to another country. In arguing to the contrary, petitioners overread *Boumediene* v. *Bush*, 128 S.Ct. 2229 (2008). *Boumediene* would be relevant here only if the core habeas right protected by the Suspension Clause allows an alien captured abroad to prevent release from U.S. custody by means of a transfer to another sovereign. Both history and *Munaf*, however, demonstrate that such relief is not a habeas right protected by the Constitution.

III. A. Petitioners claim that they have a substantial likelihood of demonstrating that they are not enemy combatants. As we have explained,

however, the relevant "likelihood of success" on the merits here is whether petitioners can obtain injunctions against transfer to another country. On that issue, *Munaf* demonstrates that there is no likelihood of success.

Attempting to demonstrate a likelihood of success, petitioners cite the Foreign Affairs Reform and Restructuring Act, but that Act limits judicial enforcement of the Convention Against Torture ("CAT"), which itself creates no judicially enforceable individual rights, to the immigration context. More recently, in 2005, Congress enacted 8 U.S.C. § 1252(a)(4), which again expressly limits enforcement of the CAT to the immigration context, and makes clear that such claims cannot be raised through a habeas petition.

B. The balance of the harms and the public interest also favor reversing the injunctions. Petitioners claim that orders such as those here cause no harm. In reality, they impair the Government's ongoing effort to remove detainees from the Guantanamo facility. Critical to that effort is the ability to negotiate with other countries to accept the transfer of detainees. The notice orders make effecting transfers more difficult because they create contingencies, the prospect of public disclosure prior to the transfer, and the potential of court review. They invite further litigation that can complicate and even derail not only the transfer of

detainees who are subject to those orders, but other detainees of the same nationality.

In contrast, petitioners cannot demonstrate any threat of injury. Petitioners cite the possible threat of torture if returned to their home country. They recognize, however, that the United States has already stated that it will not send them to their home country.

ARGUMENT

I. *MUNAF* REJECTED THE SAME ARGUMENTS PRESSED BY PETITIONERS HERE

A. Petitioners rely heavily on arguments rejected by a unanimous Supreme Court just months ago. Petitioners argue that the injunctions are justified to preserve the district court's jurisdiction over their habeas detention claims. The Court in *Munaf* v. *Geren*, 128 S.Ct. 2207 (2008), however, squarely rejected that ground as a legitimate basis for issuing an injunction against transfer to another country.

The *Munaf* detainees brought habeas actions demanding release from United States custody and invoked the All Writs Act, 28 U.S.C. § 1651, in seeking injunctive relief barring their transfer to the custody of Iraq. The district court granted a preliminary injunction barring such transfer in order to preserve its

jurisdiction, *see Omar* v. *Harvey*, 416 F.Supp.2d 19, 24-25 (D.D.C. 2006), and this Court affirmed. *Omar* v. *Harvey*, 479 F.3d 1, 15 (D.C. Cir. 2007).

The Supreme Court reversed the injunction. It first held that the district court had jurisdiction over the habeas claims. *Munaf*, 128 S.Ct. at 2218. The Court then held that despite this jurisdiction, entry of the injunction based on jurisdictional concerns was an abuse of discretion that required reversal. *Id.* at 2219. The Court went on to hold that the district court could not enjoin the detainees' transfer to the custody of Iraq (preliminarily or otherwise) as part of their habeas relief. The Court explained that the Constitution does not give detainees the right to challenge a transfer to the custody of another country, even when that transfer is alleged to be "likely to result in torture." *Id.* at 2222, 2225. And the habeas right to "release" does not mean that the habeas petitioners can pick and choose the terms, timing, location, and conditions of their release. *Id.* at 2221, 2223. Indeed, the Court specifically rejected the suggestion that detainees could use habeas as a vehicle for seeking "release in a form that would avoid transfer" to the custody of another country. *Id.* at 2223.

Finally, the Supreme Court explained that the injunction implicated the constitutional separation of powers because the detainees' alleged concerns regarding torture were "for the political branches, not the judiciary," *Munaf*, 128

S.Ct. at 2225. As the Court held, the political branches are "well situated" to assess such allegations; the courts are "not suited" to do so; and judicial second-guessing in this area would undermine the ability of the federal government to speak with one voice with respect to foreign relations. *Id.* at 2226.

Munaf requires reversal here. The Supreme Court held that the ground on which the injunctions were issued here – preserving habeas jurisdiction – is *not* a proper basis for enjoining transfer to another sovereign country. And, even if petitioners had valid claims that their detention was unlawful, an injunction barring transfer is not an available remedy for the reasons identified by the Supreme Court: there is no constitutional right to avoid release or transfer to another country, habeas petitioners cannot choose the location of their release or their transfer to another country, and the Constitution forbids courts, absent any explicit congressional authority, from second-guessing the Executive's determination that a detainee is unlikely to be tortured in the receiving state.

Petitioners posit no basis for this Court to depart from *Munaf*. Indeed, petitioners stress that the injunctions here "merely preserve the district court's habeas jurisdiction," pet. Supp. 6 – which is precisely what the rejected injunction

in *Munaf* did.[1] Petitioners' suggestion that *Munaf* held that an injunction was improper only when jurisdiction was uncertain, *see* Pet. Supp. 15, is wrong. *Munaf* first held that the district court unequivocally *had* jurisdiction, *see* 128 S.Ct. at 2218, and then held that the district court had erred in entering the injunction in aid of preserving its jurisdiction, *see id.* at 2228.

Next, petitioners assert that "*Munaf* was not an All Writs Act case." Pet. Supp. 13. Not so. The All Writs Act was invoked in the *Munaf* petition, and was the basis upon which the detainee in *Munaf* requested the injunction.[2]

Moreover, *Munaf* like this case also involved claims of possible torture upon transfer. The Court explained that the detainees' alleged concerns regarding possible torture were "for the political branches, not the judiciary." *Id.* at 2225. Thus, the rationale and holding of *Munaf* control here.

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[1] Petitioners suggest that the Supreme Court reversed the preliminary injunction in *Munaf* because it determined that the entire habeas action needed to be dismissed. Pet. Supp. 6, 13. The Court, however, explained that reversal of the injunction was required as an initial matter, independent of its subsequent inquiry into the merits of the petition. *Munaf*, 128 S.Ct. at 2219.

[2] *See Omar* v. *Harvey*, Civ. No. 05-2374, Petition for a Writ of Habeas Corpus, 4 (D.D.C. Dec. 12, 2005); *Omar* v. *Harvey*, Memo. in Support of Motion for a TRO, 6 (D.D.C. Feb. 3, 2006) ("under the All Writs Act * * * a district court with habeas jurisdiction also has the power to enjoin any action that would deprive it of that jurisdiction").

Petitioners also argue that the injunctions may stand "[b]ecause the power to order release subsumes the power to control the terms of the release." Pet. Supp. 4. But, even assuming that is true, the relief petitioners seek goes far beyond merely "control[ling] the terms of release" and is plainly foreclosed by *Munaf*. Petitioners have requested this Court to restrict the transfer of detainees to foreign sovereigns on the ground that transfer will likely result in torture, notwithstanding sworn statements to the contrary by the responsible U.S. officials.[3] *See* Pet. Supp. 3. To grant such relief, this Court would have to make the very judicial inquiry that *Munaf* expressly forbids it to make–whether there is in fact a likelihood of torture. As the Supreme Court made clear: "The Judiciary is not suited to second-guess such determinations." *Munaf*, 128 S.Ct. at 2226. "In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Ibid.*

Indeed, petitioners' claim is especially unavailing considering that they, unlike *Munaf*, are *aliens,* who were captured abroad and held outside the United

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[3] Notably, petitioners do not contest that it is U.S. policy not to transfer them unless it determines that torture in the receiving state is unlikely, *see* App. 101-102, 110; *see also Munaf*, 128 S.Ct. at 2226 (deferring to the Solicitor General's statement that "it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result").

States for purposes of the immigration laws. *See* 8 U.S.C. § 1101(a)(38) (defining the geographic scope of the United States for the purposes of the Immigration and Nationality Act) ; *see also* DTA, § 1105(g) (same for purposes of the Detainee Treatment Act). Petitioners have no immigration status or other right permitting them to enter the United States. If the U.S. citizen petitioners in *Munaf* could not challenge their transfer to the custody of another country, then, *a fortiori*, the alien petitioners here can not do so.

B. Petitioners attempt to avoid *Munaf* by invoking, and misreading, this Court's pre-*Munaf* decision, *Belbacha* v. *Bush*, 520 F.3d 452 (D.C. Cir. 2008). *See* Pet. Supp. 11-13. But the primary point for which petitioners cite *Belbacha* – that district courts hearing habeas cases have authority under the All Writs Act to issue injunctions against transfer to another country in order to preserve the court's jurisdiction – was subsequently contradicted by *Munaf*, 128 S.Ct. at 2219, and is no longer valid. Under *Munaf*, a court cannot enter injunctive relief without assessing the legal merits of the petitioner's position – here the proposition that a court can restrict and even bar the transfer of a detainee from U.S. custody to another country. This Court's ruling in *Belbacha* did not address that question. Instead, the Court simply remanded for the district court to address the merits and the other relevant factors and "to decide [in the first instance] whether a

preliminary injunction is 'necessary or appropriate' in this case." 520 F.3d at 459. As we have explained in our prior briefs, and further discuss below, a balance of those factors here demonstrates that the injunctions entered in these cases are without merit.

II. THE DISTRICT COURT LACKS JURISDICTION TO RESTRICT TRANSFER OF THE DETAINEES TO ANOTHER COUNTRY

In our opening supplemental brief, we demonstrated that the district court's injunctions barring petitioners' transfer absent thirty days' advance notice should be vacated for lack of subject-matter jurisdiction. While *Boumediene* held that the elimination of jurisdiction to hear core habeas claims challenging detention was unconstitutional, we explained that 28 U.S.C. §§ 2241(e)(1) and (e)(2) were not struck down beyond their application to such core habeas claims.

Without citation, petitioners assert that *Boumediene* holds that "the repeal of habeas jurisdiction under § 2241(e) is simply void." Pet. Supp. 7. *Boumediene* was, however, a limited decision. As explained in our opening supplemental brief, the Supreme Court's ruling invalidated § 2241(e)(1) only with respect to habeas actions "to challenge the legality of the[] detention," *Boumediene*, 128 S. Ct. at 2262, not to challenge the legality of a potential transfer to another country. Moreover, the Court plainly was not addressing § 2241(e)(2). Indeed, the Court

expressly said it was not addressing § 2241(e)(2) and its application to conditions-of-confinement claims. *See Boumediene*, 128 S. Ct. at 2243. Petitioners claim that § 2241(e)(2) does not apply in this habeas corpus context. Pet. Supp. 8-9. Petitioners cannot, however, evade Congress' clear intent to foreclose litigation of collateral, non-detention challenges by bringing, within the context of a habeas action, a motion for relief that, as *Munaf* holds, is not available under habeas.

Boumediene would only permit the exercise of jurisdiction here if the habeas rights protected by the Suspension Clause allow an alien captured abroad to prevent

his release from U.S. custody by means of a transfer to another sovereign. Both history and *Munaf* demonstrate that such relief is not a habeas right protected by the Constitution.

The right of habeas corpus, protected by the Suspension Clause, is equivalent to the habeas right under English common law in 1789. *See* U.S. Supp. 9. That common-law right was the right to seek release from the custody of the sovereign. *See* 3 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 131 (1st ed. 1765); Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 47, 85-86 n.359 (1980). The Supreme Court accordingly has noted, "[h]abeas is at its core

a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." *Munaf*, 128 S.Ct. at 2211.

Petitioners cite nothing for the proposition that the Suspension Clause protects a habeas right for foreign nationals to challenge transfers to another country – which was unknown when the Constitution was adopted. While the Habeas Corpus Act of 1679, §XI, restricted the king's practice of sending prisoners to places that he controlled but which were beyond the territorial jurisdiction of the common-law courts, there was no law restricting the release of a detainee out of the control of the sovereign to another sovereign country. That is so because only the former is an attempt of the sovereign to maintain custody, but evade review. And indeed, the latter grants an alien detainee all of the relief to which he is entitled. As *Munaf* explains, the habeas power is to order release. And a habeas court has no authority to bar release and transfer of an alien captured abroad to another sovereign.

That distinction is also reflected in Rule 23 of the Federal Rules of Appellate Procedure. That Rule bars a custodial respondent from transferring a habeas petitioner, with an appeal pending, to another venue (and another custodian) within the same sovereign entity. *See Brady* v. *U.S. Parole Comm'n*, 600 F.2d 234, 236 (9th Cir. 1979). The bar was enacted because such transfers could otherwise allow

the same sovereign entity to maintain custody while avoiding the jurisdiction of the habeas court. The Rule does not apply, however, when a transfer is made to another sovereign entity. *Ibid.* Notably, this Court has held in the context of the Guantanamo detainees, Rule 23 does not apply to cases where a detainee is released from U.S. custody and transferred to a foreign country. *See Qassim* v. *Bush*, 466 F.3d 1073 (D.C. Cir. 2006).

Finally, the argument that the Suspension Clause might prevent the transfer of a detainee to the control of another sovereign cannot be squared with *Munaf*. The Supreme Court, the same day it issued *Boumediene*, also held unanimously in *Munaf* that federal courts have no such authority. That holding is dispositive on this issue.

Because constitutional habeas rights do not include authority to bar release to the custody of a foreign country, the restrictions against judicial inquiry into transfers in both subsections of 28 U.S.C. § 2241(e) remain intact and require vacatur of the injunctions here.

III. THE INJUNCTIONS HERE FAIL UNDER THE FOUR-FACTOR TEST

Petitioners also fail to show that the injunctions were proper under the traditional four-factor test for injunctive relief.

A. Petitioners claim that they have a substantial likelihood of demonstrating that they are not enemy combatants and accordingly are entitled to release from custody. *See* Pet. Supp. 15. That issue is not, however, relevant to the orders at issue here. As we have explained, the relevant "likelihood of success" on the merits here is whether petitioners can obtain injunctions against transfer to another country. *See* US Supp. 28-29. In *Munaf*, the Supreme Court held that a court may not use its habeas powers to bar transfer to the custody of another country, even if the petitioners claim a likelihood of torture. That rationale of *Munaf* is dispositive here and demonstrates that there is no likelihood of success.

Petitioners argue, nonetheless, that they are likely to succeed in barring their transfer to another country by asserting a right under the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 ("FARRA"), which implements the Convention Against Torture ("CAT"). In enacting the FARRA, however, Congress provided for judicial enforcement of the CAT only in the immigration context. *See* FARRA, § 2242(d) ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal"). *See also Mironescu* v. *Costner*, 480 F.3d 664,

676-677 (4th Cir. 2007) ("§ 2242(d) * * *preclude[s] consideration of CAT and FARR Act claims on habeas review of an extradition challenge").

More recently, Congress, in enacting the REAL ID Act of 2005, expressly limited enforcement of the CAT to the immigration context, and made clear that such claims cannot be raised through a habeas petition or by invoking the All Writs Act. *See* 8 U.S.C. § 1252(a)(4) ("Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed * * * in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT] * * *.")

Petitioners cite cases from other circuits permitting the assertion of CAT claims in habeas cases brought by aliens seeking to avoid immigration removal. *See* Pet. Supp. 18. These cases all predate the enactment of the REAL ID Act provision cited above, which overrules these cases and makes clear that even in the immigration context, CAT claims cannot be pursued through a habeas petition. *See* 8 U.S.C. § 1252(a)(4); H.R.Rep. No. 109-72, 174 (2005). In any event, as noted above, the FARRA implements the CAT and creates judicially enforceable individual rights only in the immigration cases. The cited cases concern

interpretations of FARRA in that context. What is clear is that the FARRA does not create judicially enforceable rights outside of that context.

Finally, petitioners cite in passing several other alleged bases for their challenge to transfer. *See* Pet. Supp. 19 & n.16 (citing without any discussion, *inter alia*, the Fifth Amendment, the Third and Fourth Geneva Conventions, and the 1954 Convention Relating to the Status of Refugees). Petitioners make no attempt to explain how these sources provide a court with a basis to enforce the CAT or to otherwise bar transfer of a detainee to another country. Notably, even in cases involving *United States citizens* invoking constitutional due process rights to avoid transfer to another country, the Supreme Court and this Court have held there is no authority to bar such a transfer. *See Munaf*, 128 S. Ct. at 2225 ("even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"); *Holmes* v. *Laird*, 459 F.2d 1211, 1225 (D.C. Cir. 1972) (where U.S. citizen service members sued to prevent transfer to another country, this Court has held that the transfer presents "a matter beyond the purview of this court"). Given that binding precedent, petitioners have no relevant likelihood of success here.

B. The balance of the harms and the public interest also favor reversing the injunctions. Petitioners argue (Pet. Supp. 21) that the orders do not harm the Government or the public interest because their counsel would readily agree to a transfer to an appropriate country. The reality is, however, that by seeking injunctions restricting transfer from Guantanamo, petitioners are tying the Executive's hands in the conduct of diplomatic relations. Orders such as these[4] make effecting transfers more difficult because they create contingencies, the prospect of public disclosure prior to the transfer, and the potential of court review (including possible review of any assurances provided regarding humane treatment). *See* App. 111-112 (requiring the unilateral disclosure of "information about proposed transfers and negotiations" can "adversely affect the relationship of the United States with other countries and impede our country's ability to obtain vital cooperation"). Such orders invite further litigation that can complicate and even derail not only the transfer of detainees who are subject to those orders, but other detainees of the same nationality.

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[4] As indicated in the amended certificate of related cases, there are numerous similar orders, including the district court order requiring notice of transfer, if requested, in 117 habeas actions. *See In re Guantanamo Bay Detainee Lit.*, Misc. No. 08-442 (D.D.C. July 10, 2008).

Notably, the absence of court notice requirements was critical to the United States' ability to negotiate quietly and successfully the transfer of a group of Uighurs in 2006.

Such orders also adversely impact the State Department's ability to have frank discussions regarding the humane treatment of detainees upon their transfer. As the sworn declarations establish, such frank dialogue "depends upon the Department's ability to treat its dealings with the foreign government with discretion." App. 105. Indeed, "[i]f the Department were required unilaterally to disclose outside appropriate Executive branch channels its communications with a foreign government relating to particular mistreatment or torture concerns, that government, as well as other governments, would likely be reluctant in the future to communicate frankly with the United States concerning such issues." App. 106

The United States does not wish to hold detainees at Guantanamo any longer than absolutely necessary. Critical to the ongoing efforts to wind down detentions, is the ability to negotiate with other countries to accept the transfer of Guantanamo detainees. The court orders here, and the similar orders entered by the courts, however, impair that important effort.

C. Finally, petitioners cannot demonstrate any threat of irreparable injury. Petitioners cite to the possible threat of torture if returned to their home country.

They recognize, however, that the United States will not send them to their home country. Nor can petitioners demonstrate irreparable injury by speculating that they might be transferred to some unspecified country where they will likely be tortured. As we have explained, such transfers would be flatly contrary to United States policy. *See* App. 101-102, 110-111. Petitioners do not dispute the existence of such a policy, and they have offered no evidence even remotely suggesting that the United States would fail to honor that policy in their cases.

Thus, the injunctions here represent an abuse of both authority and discretion and should be reversed.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our previous briefs, we respectfully request that this Court vacate for lack of subject-matter jurisdiction, or, in the alternative, reverse the district court orders granting injunctive relief.

Respectfully submitted,

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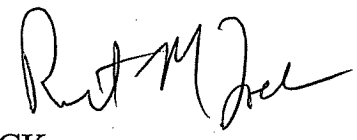
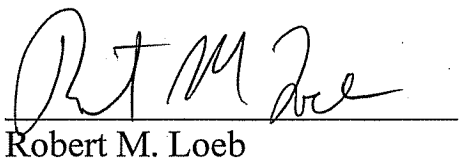


SEPTEMBER 2008

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), D.C. Circuit Rule 32(a), and the Court's July 31, 2008 order, that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 3,999 words (which does not exceed the applicable 4,000 word limit), according to the word-count of Corel Wordperfect Version 12.



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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2008, I filed and served the foregoing Supplemental Response Brief for Appellants by causing an original and fourteen copies to be delivered to the Court by hand delivery, and by causing two paper copies to be delivered to lead counsel of record as indicated:

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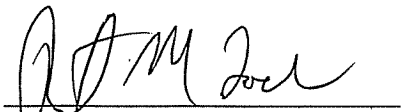

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